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might have been caused in this way. 1 Greenleaf on Evidence, 85, 16th ed. The dispute arises in regard to the admission of this sort of evidence when the particular one which is claimed to have caused the injury is identified. In some jurisdictions such evidence is admitted as showing a possible cause of the damage. *Sheldon* v. *The Hudson River R. R. Co.*, 14 N. Y. 218. Other courts lay down the rule that it has not any logical bearing upon the issue. *Gibbons* v. *Wisconsin Valley R. R. Co.*, 58 Wis. 335. This view has recently received the sanction of the Court of Appeals of Indian Territory, on the ground that, if a defendant is to be held liable for fire set by a particular locomotive, it must be for negligence, not in the operation of defective locomotives generally, but in operating that particular one. *Missouri K. & T. Ry. Co.* v. *Wilder*, 53 S. W. Rep. 490 (Ind. Ter.).

In a great variety of cases, where the means of proof are necessarily indirect, courts frequently admit as evidence matters of slight weight, simply because nothing better can be had. On this ground rests the admission of evidence of the dangerous character of the defendant's engines generally. Nor does the competency of such evidence depend upon the question whether or not the particular machine which caused the injury be known or not. It would seem to be relevant in either case. After other probable causes have been disproved, evidence that engines used by the company do in fact emit sparks tends to show that the injury complained of might well have arisen from the escape of fire from this particular engine. It is of course open to the defendant to show that any identified engine could not have caused the injury. The Indian Territory case is right in condemning the admission of such evidence to show habitual negligence on the part of the railroad, — although some courts seem to grant its competency for that purpose, *Koontz* v. *O. R. & N. Co.*, 2 Oreg. 3, — for from that it does not follow that there was negligence in this particular instance. It is in the nature of character evidence, and should not be admitted in civil actions. 12 HARVARD LAW REVIEW, 500. This evidence would seem clearly competent, however, on the grounds indicated above.

SECRET TRUSTS UPON BEQUESTS. — In disregard of the prohibition by the Statute of Frauds of any oral addition to testamentary documents, courts of equity generally enforce oral trusts intended by the testator to be attached to devises and bequests when communicated to the apparent beneficiary before the testator's death. *Brooks* v. *Chappell*, 34 Wis. 405. These seem, however, to be enforced as testamentary declarations. In fact, they cannot be treated as express trusts, for the duty does not come into existence at the time of the communication, but only on the death of the testator. The true explanation is, perhaps, that a constructive trust in favor of the intended beneficiary is imposed to enforce specific performance of a contract made by the apparent beneficiary with the testator. *McClellan* v. *McLean*, 2 Head, 684. Where the legatee expressly assents to the arrangement, it is very easy to work out a unilateral contract, in which the consideration for the promise is the bequest; but it is doubtless an unusual stretching of the principles of contract to find a promise in a mere absence of dissent. However this may be, many courts treat these as cases of constructive fraud simply. But whatever name be given to the reason for reaching this result, it seems that the

principle of specific performance is justly extended to cases where a benefit has been knowingly accepted as consideration for an act. *Administrator* v. *Rynd*, 68 Pa. St. 386.

An interesting illustration of these principles is seen in *Re Stead*, The Law Times, Dec. 9, 1899. Realty was devised to trustees for conversion, and then to hold for A and B absolutely as joint tenants. A secret trust intended to be imposed upon this latter interest was communicated by the testator before death to A, but not to B. On a bill by A to have the trust declared, the court held that A was bound by this agreement, but B was not. In that respect, at least, this decision is a marked departure from precedent. It is very ancient law that joint tenants are but one person: thus, livery of seisin to one is livery to all, Co. Lit. 496; occupation by one is occupation by all, *Small* v. *Clifford*, 38 Me. 213. And so it has been held generally that, while only those tenants in common to whom a secret trust has been communicated are bound thereby, communication to one joint tenant, as in the principal case, is sufficient to bind all. *Rowbotham* v. *Dwinett*, L. R. 8 Ch. D. 430; *Fairchild* v. *Edson*, 154 N. Y. 199. So much of the principal case, therefore, as denies enforcement of the trust against B cannot, it seems, be supported; otherwise the case follows well-accepted principles.

UNBORN CHILDREN IN CRIMINAL LAW. — A child *en ventre sa mere* may be the subject of homicide, — this was again illustrated in England last November. Under an indictment for manslaughter it was proved that the prisoner violently assaulted his wife when she was pregnant. Their child — born later otherwise in a healthy condition — had severe bruises received *en ventre sa mere* from the blows of the father. It soon died, and the prisoner was accordingly convicted of manslaughter. Solicitors' Journal, Nov. 25, 1899. The earlier English text-writers with the exception of Lord Hale have declared generally that one who causes the death of a young child by injuring it *en ventre sa mere* is guilty of homicide: 3 Inst. 50; 1 Hawk. P. C. c. 13, § 16; 4 Blackstone, c. 14. And all the judges in *Regina* v. *Senior*, 1 Moo. C. C. 346, and Mr. Justice Maule in *Regina* v. *West*, 2 C. & K. 784, without stating reasons followed the prevailing view of the text-writers. On the civil side, one finds but little sanction by analogy for this rule of the criminal law. The recognition of rights of unborn children in the law of property depends on special equitable grounds. Moreover, by the weight of authority a child cannot recover in an action of tort for damage received *en ventre sa mere*. 12 HARVARD LAW REVIEW, 209. The error, however, is not an unnatural one. The early writers felt that he who was instrumental in causing the death of a human being should be punished, and they naturally enough classed this crime as homicide. The offence, however, belongs rather in the category with the crime of the procurement of abortion. It is essential to manslaughter or murder that there be application of force to a subject of the state resulting in death. And the crime in the eye of the law occurs, not at the time and place of the death, but at the time and place of the prisoner's act. Therefore, in an indictment for the manslaughter of a young child from injuries received *en ventre sa mere*, it would be impossible for the state to prove that there had ever been force applied to one of its subjects as a member of society.